ORAL ARGUMENT REQUESTED

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

No. 88-971

IN RE: BERNARD J. DOLENZ

Petitioner,

REPLY BRIEF TO RESPONDENT'S REPONSE TO PETITION FOR A WRIT OF PROHIBITON, WRIT OF MANDAMUS, OR BOTH

SUPPLEMENTAL APPENDIX

Bernard J. Dolenz
6102 Swiss Avenue
Dallas, Texas 75214

Pro Se

PREFACE

The Respondents' appendix does not comply with Rule 33. The Respondents give many distortions in their Brief, such as no telephone communication had been received (P-6), a "dead ship" straw man argument when this was plead ALTERNATIVELY to an unfinished vessel defense (P-9), failure to send documents such as motions before the court and the judgment even though the Court and the Plaintiff knew that Dolenz was the owner of the boat from Court testimony and documents before the Court evidencing such ownershio. This brief and supplemental appendix is given to correct the Respondents' distortions. Even a pancake has two sides.

TABLE OF CONTENTS

PREFACE.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED.....2

II. THE ZLOCH COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITION..... 3

III. THE ZLOCH COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL 8

IV. THE ZLOCH COURT ABUSES ITS DISCRETION IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE..... 12

PRAYER.....13

SUPPLEMENTAL APPENDIX CONTENTS.....15

TABLE OF AUTHORITIES

BANKER'S MORRTAGE CO. V. UNITED STATES, 428 F2d 73 (5th Cir. 1970), cert denied, 399 U.S. 927.....10

BURNLEY V. THOMPSON, 524 F2d, 1233..11

CHRISTHILF V. ANNAPOLIS EMERGENCY HOSPITAL ASS'N INC., 496 F2d 174 appeal after remand, 552 F2d 1070 11

MILLS V. MILLS, 232 Va 94, 348 SE2d 250, 3 VLR 549.....7

RODGERS V. WATT, 722 F2d 456, (9th Cir. 1983).....10

TESSMER V. WALKER, 833 F2d 934, (11th Cir. 1987).....8

VILLEGAS V. CARTER, 711 SW 2d 624 (Tex. 1986).....7

Miscellaneous
17 Am. Jur 2d 130.....7
Magna Carta.....9
U. S. Constitution, Amend 5, 14.....9
FRCP 77(d).....8
FRCP 60(b).....10
Rule E, 4(f).....12
FRAP 8.....12

No. 88-971

IN THE SUPREME COURT OF THE UNITED STATES

In re BERNARD J. DOLENZ, Petitioner

REPLY BRIEF TO RESPONDENT'S RESPONSE TO PETITION FOR A WRIT OF PROHIBITON, WRIT OF MANDAMUS, OR BOTH

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Bernard Dolenz, owner of the Defendant Aries Star Trek, gives this his Reply Brief to Respondent's Reponse to the Petition for a Writ of Prohobition, Writ of Mandamus, or Both, and would show the Court as follows:

I. THE TRIAL COURT LACKS JURISDICTION AND THE CASE SHOULD BE DISMISSED

Lack of jurisdiction is plain, and it is indeed strange that with this evidence, the Zloch Court gave Findings that were contrary to these facts:

(1) The U. S. Marshall upon arresting the vessel 7/10/86 stated: "...Vessel is incomplete, under construction, and empty of equipment..." P-10, Appendix.

(2) Ray Seese, Plaintiff's expert and Marine surveyer states that the vessel has never been completely finished or commissioned... P-43, Appendix.

(3) Statements of Burdick in a local newspaper article that the Boat is abut 70% completed. P-44, Appendix.

These facts were pointed out to the Court with Motions to dismiss because of plain lack of an underpinning for a maritime contract March 18, April 4, April 18, and April 9, 1988. This makes one wonder who

authored the judgment.

The boat was never launched. The infrastructure was built in Taipei in 1968 and freightered to this country, with the intent to finish it here. The owner died, with the unfinished boat being moored in a river for over a dozen years while in an estate. The boat was moved to Stuart Yacht for work to begin its completion and launching. P-44, Appendix.

A boat that has never been completely finished or commissioned, as Ray Seese points out in his survey, lacks Admiralty jurisdiction. See Memorandum of Law, P-77 et seq.

II. THE ZLOCH COURT ERRED IN ALLOWING THE DEFENDANT ARIES STAR TREK TO BE WITHOUT COUNSEL BY DISMISSING COUNSEL AND REFUSING TO CONTINUE THE CASE, PLACING THE DEFENDANT VESSEL IN A DEFAULT POSITIION.

When the boat was arrested, Attorney Lyman Reynolds was hired to defend the vessel. Melissa Keyes told the Court that Bernard Dolenz was a partner with her in the boat, had an interest in it while Lyman Reynolds was defending the vessel. (Res. App. P-41). Reynolds tried to withdraw as counsel upon learning that Burdick received a unsubstantiated purported threat, which Burdick was imputing to the vessel. Docket P-45 Appendix. Motion to withdraw as counsel and Motion to continue were both denied March 12. On the 16th, the Court allowed Reynolds to withdraw as counsel, and refused to continue the case or even a suggestion to continue (P-52, Respon. Appendix).

Several phone calls were placed to Judge Zloch that morning by Bernard Dolenz (Affidavit of Bernard Dolenz attached to

Motion to Dismiss; Motion to Reconsider March 18, 1987; P-43 of Resp. Appendix; Affidavit, P-62), Why the Court refused to return phone calls to Dolenz and with Lyman Reynolds being allowed to abandon a case for which he was hired without a continuance seems abhorant to any system of justice, particularly when communications were made to the Court. Contrary to the statement on P-53 by the Court, there were contacts with the Judge's clerk about wanting a continance and a conversation with the judge. This request was not honored. Melissa Keyes, not being an attorney, told the Court that Dolenz was trying to call you (Zloch) this morning (P-43), was in Court in Texas (P-43), and was hoping for a continuance so that he could properly prepare the case (P-46) because Reynolds wanted to abandon the case, and did. From an interest standpoint, the Court

knew Dolenz had part interest several months earlier, and Reynolds was denied his motion to withdraw as counsel a couple days earlier. Reynolds was hired to represent the Aries Star Trek, the Defendant. When Melissa Keyes asssigned the remaining interest in the boat, giving full ownership to Dolenz, what difference did this make on defending the vessel? Furthermore, Melissa Keyes still had title to her remaining interest until such time as the assignment was DELIVERED. She had standing to continue, and Mr. Perry misrepresented to the Court that she lacked standing (P-47). The Court should either have allowed Mr. Reynolds to defend the vessel with the purported threat that Mr. Burdick alleged, or continue the case so that the defendant vessel could get substitute counsel.

The issue of Assignments is covered on P-71.

In VILLEGAS V. CARTER, 711 SW2d 624 (Tex 1986) the trial court abused its discretion in denying a motion to continuance after allowing the attorney to voluntarily withdraw two days before trial where the client was not negligenet or at fault in causing his attorney's withdrawal, the client had too short a time in which to find a new attorney and to have that attorney investigate the case and prepare for trial.

Similarly a trial court abused its discretion by denying continuance, and client was prejudiced thereby, where client had little or no advance notice that her counsel would withdraw on morning of trial of a complex matter. MILLS V MILLS, 232 Va 94, 348 SE2d 250, 3 VLR 549. Most jurisdictions have similar case law. 17 Am. Jur 2d 130.

III. THE ZLOCK COURT ABUSED ITS

DISCRETION IN DENYING THE MOTION TO EXTEND TIME TO APPEAL

Argument is given on P-77 et seq and will not repeated here.

While the Clerk did not send notice of the judgment to the owner, Bernard J. Dolenz, per FRCP 77(d), Bernard J. Dolenz complied with the efforts outlined in Tessmer v. Walker, 833 F2d 934 (11th Cir. Dec. 1987), and it was an abuse of discretion at the Trial Court to deny his Motion for an Extension of Time to Appeal.

In this regard, Bernard J. Dolenz made repeated inquiries by phone, as well as a couple of visits to review the file, requesting repeatedly of Judge Zloch's clerks and staff to expedite the Motions

before the Court and to keep Bernard J. Dolenz posted. These inquiries were made repeatedly of the Clerk as well as Judge Zloch's secretary. Because of the multiple calls to Ms. Greenberg, she indicated that the Clerk's office would keep me informed.

I was unable to have even a hearing before Judge Zloch even in spite of a Motion For Hearing, even though the Court file reflects that I was the owner of the vessel. I never saw the Judge, and even though repeated requests were made by Motion, he would not grant a hearing, and seemingly conducted this case like a "Star Chamber proceeding", which was obviated in 1215 by the signing of the Magna Carta, which principles of due process have been adopted in Amendments 5 and 14 of the U.S. Constitution.

Bernard J. Dolenz believes that he did everything reasonable under the

circumstances to be kept informed short of groveling and living at the Ft. Lauderdale Federal Courthouse. Bernard J. Dolenz asks of this Court what else he could have done under the circumstances.

Rodgers v. Watt, 722 Fd2 456, (9th Cir. 1983), holds that Rule 60(b) should be liberally construed, and that the provisions of the Rule must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the "incessant command of the Court's conscience that justice be done in light of ALL the facts". Banker's Mortgage Co. v. United States, 428 F 2d 73, 77 (5th Cir.), cert. denied, 399 U.S. 927, 90 S. Ct. 2242, 26 L. Ed. 2d 783 (1970) (emphasis in original).

This Court should consider ALL the facts and in particular, consideration that the Trial Court had no business with

this case in the first place as it lacked jurisdiction, and also because the Trial Court would not even consider the rights of the owner, Bernard J. Dolenz, to the vessel, and would not grant a hearing for its defense, violating due process considerations.

In this regard, "Opportunity for a hearing required by due process must be given before the deprivation of a property interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". U.S.C.S. Const. Amend. 14, Burnley v. Thompson, 524 F2d 1233.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

owner should be permitted to have a counter-claim for these damages.

The Plaintiff also exhibited misconduct by not sending documents, as they had done in the past, regarding the MOTION FOR AN AWARD OF COSTS filed March 4, 1988, and giving any notice of the final judgment. The Clerk of the Court at no time sent any notice to me of the final judgment.

Additionally, the owner contends that the judgment is void as this Court does not have jurisdiction over the "vessel" as it has never been finished or commissioned according to statements appended hereto given by Greg Burdick, the U.S. Marshall who arrested the vessel, and marine surveyor Ray Seese.

Bernard Dolenz, as owner, was unable to defend the Defendant due to forcible obstacles from the Court as it would not grant a hearing, even though requested, and would not return the

ruling from that Court.

PRAYER

Petitioner prays of this Honorable United States Supreme Court that:

1. A Writ of Mandamus or a Writ of Prohibition be issued by this Court directed to the Honorable William J. Zloch to dismiss the case as the Court lacks jurisdiction;

2. The 11th Circuit ruling on the Motion for Re-Hearing on Petition for Writ of Prohibition and/or Writ of Mandamus be corrected affirmatively for the owner of the Defendant vessel;

3. The Defendant vessel be released to the Petitioner without impediment for its placement into the water;

4. Alternatively, for immediately release of the vessel pending appeals before this Court;

5. For Rule 11 sanctions against the Plaintiff;

6. For General Relief.

Respectfully submitted,

Bernard Dolenz

CERTIFICATE OF SERVICE

Three copies of the foregoing instrument were sent by regular mail to Judge William J. Zloch, U.S. District Judge, Room 202B, 299 East Broward Blvd., Fort Lauderdale, FL 33301 and to Steven Perry, Plaintiff's Attorney, P. O. Drawer 24, Stuart, FL 33497-0024 on this the ___th day of February, 1988.

SUPPLEMENTAL APPENDIX CONTENTS

DOCKET SHEET (PARTIAL).....45

NOTICE OF MOTION FOR INTERVENTION....46

BRIEF TO SUPPORT THE MOTION TO DISMISS 48

MOTION TO VACATE JUDGMENT, MOTION TO VACATE PLAINTIFF'S MOTION FOR AN AWARD OF COSTS & MOTION FOR MODIFICATION OF THE ORDER APPOINTING SUBSTITUTE CUSTODIAN & ORDER 59

AFFIDAVIT OF BERNARD DOLENZ.....62

MEMORANDUM OF LAW.....71
- Issue of Assignment.....71
- Ownership of Defendant Vessel...72
- Property subject to Jurisdiction73
- Raising Lack of jurisdiction....76
- Due Process Not Allowed to Bernard Dolenz.....76
- Motion to Vacate Judgment Should be allowed.....77

PUBLISHER'S NOTE:

The following pages are unavailable for filming:

16 - 44

(DOCKET SHEET)

DATE	/DOC.#/	PLEADING
1987		
Feb 3		
	27 /19/	MOT. to widraw as counsel for Def.
	27 /20/	MOT. to cont. by Deft.
Mar 12	/21/	ORDER (WJZ-3-12-87) m/to/w/draw as counsel (dkt #19) is DENIED, m/to cont (dkt #20) is DENIED (EOD3-13-87)
	13 /22/	NOTICE of trial conflict by deft.
	16 /23/	MINUTES 3-16-87 hrg on 1st day of trial - trial concluded
Mar 19	/24/	ORDER (WJZ-3-19-87) m/to w/draw as counsel is GRANTED (EOD3-20-87)
	20 /25/	NOTICE of m/for intervention, rule 24(a)., by intervening pltf
	20 /26/	COMPLAINT in personam against Boatyard for negligent performance of repairs; wrongful arrest, by intervening pltf.
	20 /27/	MOTION to dismiss & MOTION to reconsider., by intervening pltf.
	20 /28/	BRIEF in supp of DOC #27

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA - ADMIRALTY DIVISION

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS. NO.
8668384-CIV-Zloch

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

NOTICE OF MOTION FOR INTERVENTION,

Rule24(a)

TO THE HONORABLE JUDGE OF SAID COURT:

PLEASE TAKE NOTICE, that upon the attached affidavit of Bernard Dolenz, verified March 18, 1987, and upon the annexed proposed complaint, the undersigned moves this court to set a date so Intervenor/attorney can be heard for an order permitting Bernard Dolenz to intervene as a plaintiff in this action in order to assert his claim against the defendant vessel, ARIES STAR

TREK, set forth in the proposed complaint annexed hereto, pursuant to the provisions of Rule 24(a) of the Federal Rules of Civil Procedure, on the ground that the proposed intervening plaintiff claims an interest in the defendant vessel, ARIES STAR TREK, and its proceeds and the disposition of this action might impair or impede said proposed intervening plaintiff's ability to protect his interest.

CERTIFICATE OF SERVICE

Copies of the foregoing instruments have been sent by regular mail to:

Stephen Perry, Attorney
555 Colorado avenue, suite 1
P.O. Box 24
Stewart, Florida 33495-0024

Lyman Reynolds, Attorney
P.O. Box 709
West Palm Beach, Florida 33402

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORID

ADMIRALTY DIVISION

CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

Defendant.

_____/

BRIEF TO SUPPORT THE MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

THE COURT LACKS JURISDICTION

The Plaintiff assumes that jurisdiction exists choosing for his own reason to have this case decided by an admiralty court hoping that the jurisdictional point may be easily over-looked by the Court when it is dealing with the contract having a nautical favor.

An inspection of the Plaintiff's documents confirm that exploratory carpentry, design and engineering, keel fabrication, design engineering and consultation, placing in a stearing system, and alterations to the vessel all relate to the original construction of the vessel. EXHIBIT "A"

This contract, being one for services of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333(1). In Bond v. F/V Mermaid (1970, DC Fla) 311 F. Supp 1013, a naval architect filed a complaint in rem against a vessel for alterations and additions to its plans ordered by the owners of the Defendant vessel, asserting admiralty jurisdiction, but the Court found that the extra work performed, that is, drafting, conferences, calculations, and the like, all related to the original construction of the vessel, and that

services furnished under the later agreement for changes were supplied in contemplation of completing the original undertaking for the design and supervision of the vessel's construction. This contract, being one for services furnished in the construction of a ship, does not furnish a basis for a claim within the admiralty jurisdiction provided for in 28 USCS Section 1333 (1), the Court concluded.

The Plaintiff's own invoices and statements indicate that Mr. Burdick knew that the boat was "only about 70% completed". EXHIBIT "B". In EXHIBIT "B", Burdick indicates that he is in the process of re-designing the unfinished boat. the bottom-side still required interior finishing, installation of wiring, plumbing, steering mechanisms, engine fittings, desk fittings, masts and riggings. The boat was never

completed because of lack of funds to complete her by the previous owners.

Lack of jurisdiction may be raised at any time, even upon a second appeal of an action in which the point was never raised in the trial court, and was not advanced in a previous appeal (Flota Maritima Browning de Cuba, Sociadad Anonima v. Snobl (1966, CA4 Md) 363 F2d 733, cert den 385 US 837, 17L Ed 2d 71, 87 S Ct 82), and when raised must be examined and decided (Armstrong Cork Co. v. Farrell Line, Inc. (1948, DC Pa) 81 F Supp 848). Or the court itself may raise the issue, and, consequently, Plaintiff's counsel must be prepared to demonstrate admiralty jurisdiction to a court's satisfaction, and his failure to cary this burden when called upon by the Court, even though Defendants counsel also argues to the Court that there is no problem as to jurisdiction, will result in dismissal (Rhederei Actien

Gesellschaft Oceana v. Clutha Shipping Co. (1915, DC Md 226 F 339).

Agreements for alterations and additions to plans ordered by the owners are not maritime contracts and, hence, not within the purview of admiralty jurisdiction. This holding has been repeated many times by decisions of the United States Supreme Court beginning in 1857 with People's Perry Co. v. Beers (1857) 61 US 393, 15 L Ed 961. People's Ferry held that District Courts of the United States had no jurisdiction to proceed in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends, pointing out that liens on vessels encumber commerce.

The Court said that it would be a strange doctrine to hold the ship bound in a case where the owner made the

contract in writing, charging himself to pay by installments for building the vessel at a time when she was neither registered nor licensed as a seagoing ship, and that as to the contract being purely maritime and touching rights and duties appertaining to navigation, it was a contract made on land, to be performed on land, the wages of the shipwrights having no reference to a voyage to be performed, so that they were bound to rely on their contract.

In Thames Towboat C. v. The Schooner "Francis McDonald" (1920) 254 US 242, 65 L Ed 245, 41 S C t 65, the United States Supreme Court held that the Plaintiff's contract to furnish materials, work, and labor for her completion made after the schooner was launched BUT WHILE NOT SUFFICIENTLY ADVANCED TO DISCHARGE THE FUNCTIONS FOR WHICH SHE WAS INTENDED, was not within the admiralty and maritime jurisdiction. (Emp. added).

THE DEFENDANT "ARIES STAR TREK" IS NOT A VESSEL

"The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Act of July 18, 18966 Ch 201 Section 1, 14 Stat 178, incorporated into the Revised Statutes as Section 3.

The "Aries Star Trek" has never been seaworthy, and has never been capable of being used as a means of transportation on water. Basically, this is why the "Aries Star Trek" was placed in the Plaintiff's hands so that she could become seaworthy. The Defendant never had a crew or machinery in operation that would make it navigable.

ALTERNATIVELY, DEFENDANT "ARIES STAR TREK" WAS A "DEAD SHIP".

Assuming that the Plaintiff contends that the Defendant "Aries Star Trek" was launched, which is denied by the Defendant, it should be clear that the "dead ship" doctrine would apply as the Defendant was withdrawn from any maritime activity or navigation and therefore would not fall within the admiralty jurisdiction. "A ship is made to plough the seas, and not to lie at the walls." The Poznan (1925, CA2 NY) 9 F 2d 838, revd on other grounds New York Dock Co. v. The Poznan, 274, US 117, 71 L Ed 955, 47 S Ct. 482.

In Nanna v. The Meteor (1950, DC NY) 92 F. Supp 530, affd (CA2) 184 F2d 439, cert den 349 US 933, 95 L Ed 673, 71 S Ct 497, the Meteor had been part of a reserve fleet which was purchased by the Plaintiff from the US Maritime

Commission. The boat's Coast Guard Certificate of Inspection had expired, as had her Certificate of Enrollment and license with the Bureau of Customs. The vessel was towed to New York where painting services were performed, and during that period it had no crew, light, heat, or power, and no machinery in operation. The Court found that in order for the Meteor to have been returned in navigation and commerce, there would have been required very extensive repairs AND PROPER DOCUMENTATION, and concluded that the Meteor was a "dead" ship.

This is analagous to the Defendant "Aries Star Trek" as it needs extensive work before it can even be seaworthy, and will require proper documentation before it can be returned for navigation and commerce.

The "dead ship" doctrine was considered in Hercules Co. v. The Brigadier General

Absolom Baird (1954, CA3 NJ) 214 F2d 66, where the District Court found as fact that at the time of labor and services for which a maritime lien was sought, the vessel "was not in commission and she was unable to sail, " and concluded that no maritime lien arose under 46 USC Section 971.

The Defendant is not in commission and is not able to sail as the top-side has never been out-fitted with masts and rigging.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Defendant prays of the Court to dismiss this action as it lacks jurisdiction, there was no maritime contract the Defendant "Aries Star Trek" is not a vessel as defined in Admiralty Law; and alternatively, that the Defendant is a "dead ship", and for Rule 11 Sanctions

against the Plaintiff as the Court may deem proper for the vexatious and frivolous lawsuit brought into this Court without jurisdiction; and for costs of Court and attorney fees expended in defending this case; and for general relief.

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

On the 4th day of April, a copy of the foregoing instrument and Claim of Bernard J. Dolenz was sent by regular mail to Steven Perry, P.O. Drawer 24, Stuart, FL 33495-0024.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORID

ADMIRALTY DIVISION

CASE NO. 86-8384-CIV-ZLOCH

STEWART YACHT BUILDERS, INC.,

Plaintiff

VS.

ARIES STAR TREK, enrollment #55798, together with all tackle and apparel

Defendant.

_____/

MOTION TO VACATE JUDGMENT
MOTION TO VACATE PLAINTIFF'S MOTION FOR AN AWARD OF COSTS &
MOTION FOR MODIFICATION OF THE ORDER APPOINTING SUBSTITUTE CUSTODIAN & ORDER

Defendant moves the Court to vacate and set aside the final Judgment entered against Defendant in this cause on February 16, 1988, and to grant leave to Defendant to defend itself through its owner, Bernard J. Dolenz, and to allow the filing of the counter-claim for damages against the Plaintiff or his

breach of bailment, on the grounds as more fully appears from the affidavit of Bernard J. Dolenz, attached as Exhibit "A", and the memorandum of law attached. Defendant also moves the Court to vacate and set aside its order granting the Motion for Modification of the Order Appointing Substitute Custodian and to Deny the Motion for an Award of Costs on the grounds as more fully appears from the affidavit of Bernard Dolenz, attached hereto as Exhibit "A" and the annexed Memorandum of Law.

Dated: 04/09/88

Respectfully submitted,

Bernard J. Dolenz, J.D., M.D.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been sent by regular mail to Steven Perry, P.O.

Drawer 24, Stuart, FL 33495-0024 on this 11th day of April, 1988.

_____.
Bernard J. Dolenz

AFFIDAVIT

State of Texas

County of Dallas

Bernard J. Dolenz, being duly sworn, deposes and says:

My name is Bernard J. Dolenz. I am over 21 years of age, have never been convicted of any felony, and am competent to make this statement.

I am the owner of the Defendant "vessel" Aries Star Trek, and the Claim of Bernard J. Dolenz was filed April 6, 1987 in this Court. While there was an oral agreement for an assignment of all the rights of the defendant "vessel" March 15, 1987, the written assignment was not received by me until on or about March 26, 1987 in Dallas, Texas. From the time of March 15 to when I received the written assignment, I viewed Melissa Keyes as having equitable title to the "vessel", and Mr. Lyman Reynolds was an

attorney representing the interests of the Aries Star Trek.

Mr. Reynolds tried to abandon Melissa Keyes when he heard that the Plaintiff's owner, Greg Burdick, was threatened and placed a "withdrawal" motion before the Court, which the Court denied, shortly before trial.

I learned that the Court denied Mr. Reynold's Motion For Continuance March 16, 1988 and that the case was going to trial. I tried to reach the Court several times that morning because I needed to explain, and wanted to explain to the Court that I did not have any writing reflecting my ownership interest, and that Mr. Reynolds should try his best to represent the Aires Star Trek. The Court refused to accept my several phone calls, or to even call me back. Furthermore, to this date I have never met the Judge involved in this case, and have been denied hearings

before this Court, even though requested.

Additionally, I had a phone call in for Mr. Reynolds, but he did not return my calls to explain that Melissa Keyes still had equitable title to the "vessel" as I had never received the assignment. Melissa Keyes says Mr. Reynolds abandoned her during the trial process. This placed the Defendant "vessel" in a default posture, which was suprising, since the Court would not allow a continuance.

Melissa Keyes is not an attorney, and could not be in a position to understand the legal impact of her attorney abandoning her at trial time.

The Plaintiff's attorney, Mr. Perry, indicated to the Court that "Ms. Keyes obviously no longer has standing before this Court" on P. 13 of the Trial Transcript. The Court on P. 17 of the Transcript states "...Mr. Dolenz had

sufficient time to have made contact with the Court's chambers and there has been no such contact..." This is not correct as I tried on several occasions to reach the Judge of this Court to obviate the very problems that has so much turmoil. Ms. Keyes represented to the Court that I was the owner. Even though there have been numerous papers filed with the Court reflecting my involvement with this case, and with Mr. Perry sending me copies of documents, I have been the Real party in interest and owner of the Defendant "vessel", and have filed my claim of ownership, which has never been controverted.

Mr. Perry has not sent me notices of his Motion for Modification of the Order Appointing Substitute Custodian and no one, including the Clerk, has ever sent me a copy of the Final Judgment filed February 16, 1988. I

learned about it from "Cathy" who informed me of same April 6, 1988.

During this entire case, as the owner of the "vessel" it is my contention that I have been deprived of due process as the Final Judgment allows for the sale of my "vessel" without my ever being able to defend it. This has deprived me of my property without due process of law, and seems abhorrent to any system of justice.

The owner has meritorious defense as the boat was never commissioned or finished, according to Ray Seese, Plaintiff's marine surveyor. Mr. Burdick said that the boat was only 70% complete, and is so quoted in a newspaper article which is attached. The return from the U.S. Marshall, following the arrest, also states that the "vessel" was not complete. The attached documents in support of these statements are true and correct copies.

The owner has a meritorious claim as neither Greg Burdick nor any representative of the Plaintiff had any documents in the Court's file to show compliance with the Court's order filed July 3, 1986 that "the Plaintiff shall file with the Court on a monthly basis a statement of condition of the vessel". When I visited with Mr. Burdick and saw the "vessel" for the second time, it had deteriorated under his care as the starboard side, facing the sun, had board warpage with cracks between the planks, which it did not have upon my first inspection. Mr. Burdick also said that he had not started the diesel engines, which need to be run every couple of weeks to keep the motor seals from deteriorating. In this regard, I believe that Mr. Burdick breached his bailment responsibilities as bailee, and custodian of the vessel, and that the

IV.THE ZLOCK COURT ABUSES ITS DISCRETION IN NOT RELEASING THE DEFENDANT AIRES STAR TREK AS FUNDS HAVE BEEN TENDERED TO THE COURT FOR ITS RELEASE.

Two motions are before this Court for the release of the defendant. One sent June 30, 1988, and the second September 27, 1988. The Court has been tendered $44,995.78 dated 6/30/88 and has possession of the check. In spite of authority of Rule E, 4(f) for the release from arrest, the Court refuses to release the boat or give a ruling on why not. The 11th Circuit has had a FRAP 8 Motion sent July 14, 1988 because of the insensitivity of the Zlock Court, and likewise there has been no reponse or

phone calls on March 16, 1987 to Bernard Dolenz, when the Court allowed Melissa Keyes to be without counsel, would not continue the case, and placed the defendant vessel in a default posture.

It is the owner's contention that the Court should allow, under these circumstances, the vacation of the judgment in the furtherance of justice, as the Judgment is manifestly unjust. the vacation of the Judgment should be allowable, pursuant to Rule 60 (b)(1)(3)(4)(6).

_____

Bernard J. Dolenz

Subscribed to and sworn to before me on this 9th day of April, 1988.

_____

Brenda J. Dolenz
Notary Public in and for
The State of Texas

My commission expires
12/06/89

[See page 10 for U.S. Marshall remarks upon arrest]
[See page 43 for Marine surveyor portions]
[See page 44 for statements heard by owner of Stuart Y

MEMORANDUM OF LAW

ISSUE OF ASSIGNMENT

On March 16, 1987, when the Court forced the case to trial and allowed Lyman Reynolds to withdraw, the transfer of title from Melissa Keyes to Bernard J. Dolenz, pursuant to assignment, had not taken place because delivery of the assignment did not occur until on or about March 26, 1987. The delivery was made in Dallas, Texas.

"Where the assignment is by a written instrument, simply signing or acknowledging the instrument is not sufficient to transfer the property, and delivery of the instrument is necessary to complete the assignment". Heyman v. Kline, D.C. Conn., 344 F. Supp. 1088, affirmed in part and reversed in part on other grounds, C.A., 456 F.2d 123, certiorari denied 93 S.Ct. 53, 409 U.S. 847, 34 L. Ed. 2d 88.

"As a general rule, in every transfer of title from one person to another, there must be an actual or constructive delivery of the thing, or paper title thereto, with intention to

pass title, and an actual or constructive acceptance, so as to end dominion on the one side an create it on the other'. 6 Am Jur 2d, 274, Section 91 dealing with Delivery.

The general rule is that in order to make an assignment effective, there must be in addition to a delivery of the thing assigned, an actual or constructive acceptance thereof by the assignee". 6 Am Jur 2d, 276, Section 93 dealing with Acceptance by assignee.

Texas law should apply to the assignment inasmuch as delivery was made in Texas.

OWNERSHIP OF DEFENDANT VESSEL

When Bernard Dolenz received the assignment in Texas, on or about March 26, 1987, title then passed to him and he should be able to sue in his capacity as the owner, or defend in his capacity as the owner.

"An assignee may sue in his own name and even for future interests. A right or interest to be assignable at common law, must have either an actual or potential existence. A thing has potential existence if it may actually exist at some future time". 7 Tex. Jur 3rd 186-187.

PROPERTY SUBJECT TO JURISDICTION

The Defendant vessel was never launched, but even if she was, she was not sufficiently advanced, she was not yet sufficiently advanced to discharge the functions for which she was designed, and the Melissa Keyes contract was to make changes in the original design, and have materials and labor furnished to that effect. Therefore, this Defendant vessel should not have been sued in Admiralty.

"...a vessel in the process of construction will become a vessel in terms of Admiralty jurisdiction only after its launching". 2 Am Jur 2d 73, Section 30 dealing with Admiralty.

"Even after the vessel was launched while she is not yet sufficiently advanced to discharge the functions for which she is designed, the materials, work and labor for her completion are not the subject matter of admiralty

jurisdiction". Thames Towboat Co. v. The Francis McDonald, (1920) 254 U.S. 242, 65 L.ed. 245, 41 sup. Ct. Rep. 65.

Supplying materials for construction of a vessel is not a maritime contract. People's Ferry Co. v. Beers, (1857) 61 U.S. (20 How.) 393, 15 L.ed, 961.

"A vessel is deemed to be still in the process of construction if it is not yet completed for the intended purpose, though it may have been launched". 2 Am Jur 2d, 756, Section 65 dealing with construction of vessels.

Proceedings in rem allow the owner to defend it against claims.

"Although technically, in a proceeding in rem, the res, not its owner, is the party defendant, such a proceeding nevertheless incidentally affects the persons interested in the, res, and they are entitled to defend it against the claim. Accordingly, it has been said that in a proceeding in rem, by virtue of dominion over the thing, persons interested in it are deemed to be parties to the suit". 2 Am Jur 2d 807, Section 144 dealing with Proceedings in rem.

THE MOTION FOR AN AWARD OF COSTS BY PLAINTIFF IS INAPPROPRIATE

The defendant failed to send notice regarding the Motion, and even if he had, he waived his claim to it, as the plaintiff, in accepting the appointment as a substitute custodian for the vessel, accepted the condition under 2a of the Court Order, filed July 3, 1986 that the "Plaintiff shall not be entitled to charge for storage as substitute custodian". Also, in the same order, under 2, the Plaintiff was obliged to file with the Court on a monthly basis a statement of condition of the vessel. No such instruments are shown to be filed in the Court record. By waiver and laches, and acceptance of the condition to be a substitute custodian, the Plaintiff should not be awarded costs.

"It must especially determine whether there has been inexcusable delay on the part of the one seeking the remedy and whether substantial prejudices may result to the opposite party, although if the libel shows on its face that it may be barred by laches

because of undue delay in instituting it, prejudice to the respondent is presumed until the contrary is made to appear". 2 Am Jur 2d, 834, Section 190 dealing with Laches.

RAISING LACK OF JURISDICTION

"Jurisdictional objections may be raised at any stage of the proceeding before final adjudication, and may be raised for the first time on appeal". 2 Am Jur 2d, 842, Section 202.

The record is repleat with cases showing that the Court lacks jurisdiction because the boat has not been finished, and the cites will not be repeated.

DUE PROCESS NOT ALLOWED

TO BERNARD DOLENZ

Bernard Dolenz, as owner, has been deprived of due process, as he has not had a hearing or been given an opportunity to defend the vessel, even if the Court had jurisdiction.

"One incident of constitutional protection against state deprivation of a property interest is that, at some point, notice and a hearing appropriate to the particular circumstances must be afforded". Collins v. Wolfson, 498, F2d 1100.

"Opportunity for a hearing required by due process must be given before the deprivation of a properly interest except for extraordinary situations where some valid governmental interest is at stake which justifies postponing the hearing until after the event". U.S.C.S. Const. Amend. 14, Burnley v. Thompson, 524 F2d 1233.

"Right to a hearing embraces an adequate opportunity to defend". Christhilf v. Annapolis Emergency Hospital Ass'n, Inc. 496 F2d 174, appeal after remand 552 F2d 1070.

MOTION TO VACATE JUDGMENT

SHOULD BE ALLOWED

The Courts should and do give a liberal construction to 60(b). Klapprott v. United States (1949) 335 US 601, 609, 69 S.Ct. 384, 387, 93 L ed 266. Each order or judgment shall be noticed by the clerk upon each party. Rule 77(d). Here the Final Judgment and the Order allowing the Motion For Modification of the Order Appointing Substitue Custodian were not sent to the owner, Bernard J. Dolenz. Also the Plaintiff did not send its Motion for

Modification of the Order Appointing Substitute Custodian or its Motion For Award of Costs, and there is no Certificate of Service to the owner, Bernard Dolenz, as is required.

Therefore, all these should be voided.

The owner, since he did not receive notice, did not have the opportunity to defend the claims against the defendant "vessel", has a meritorious defense, and has not received notices from the clerk regarding the final judgment or copies of the motions from the Plaintiff, rule 61(b)(1) comes into play because of mistake, inadvertence, surprise, or "excusable neglect". Foley v. United States, 645 F.2d 155 (2d Circuit - 1981). United Coin Meter Co. v. Seaboard Coastline R.R., 705 F 2d 839 (6th Circuit - 1983); Davis v. Musler, 713 F2d 907 (2d Circuit - 1983).

Lyman Reynolds was hired to defend the vessel by Melissa Keyes, and should not have been allowed to abandon defending the vessel, certainly while Melissa Keyes had equitable title. Dolenz was led to believe that Lyman Reynolds would defend the vessel until such time as he received the assignment to pass title. From a default judgment where individual defendant erroneously believed corporate defendant's counsel would represent him, relief was granted in Tickerton v. Record Museu, Inc., 92 F.R.D. 6 (E.D. Pa. 1981).

Rule 60(b)(3) comes into play because of the misconduct of the Plaintiff, wherein several motions have not been sent the real party in interest, the owner Bernard Dolenz as required. This deliberate withholding of relevant documents has prevented the owner from fully and fairly presenting his defense. See U.S. v. Undetermined

Quantity, 583 F2d 942 (7th Cir. 1978) and Wilkin v. Sunbeam Corp., 466 F2d 614 (10th Cir. 1972).

Rule 60(b)(4) comes into play as a party is allowed relief from a void judgment because of lack of jurisdiction. Such a judgment is legally ineffective, or as sometimes stated, a nullity. Willams v. North Carolina 325 U.S. 226 (1945); Kalb v. Feurestein, 308 U.S. 433 (1940); Jordon v. Gilligan, 50 F2d 701 (6th Cir. 1974), cert. denied, 241 U.S. 991 (1975).

"Traditionally, a void judgment could be set aside at any time." See 1 Freeman, JUDGMENTS, Section 322. Today, because they are viewed as a legal nullities from their inception, void judgments may still be vacated at any time by the courts which rendered them. See Misco Leasing, Inc. v. Vaughn, 450 F2d 257 (10th Cir. 1971) where a default judgment entered without personal

jurisdiction vacated after a period of over two years; and Crosby v. Bradstreet Co., 312 F2d 483 (2nd Cir. 1963) where relief from an invalid injunction granted after 29 years.

Rule 60(b)(6) liberally applies to situations not covered by the other 5 clauses. The district court has power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice. See Good Luck Nursing Home Inc. v. Harris, 636 F2d 572 (D.C. Cir. 1980).

The Court should allow Dolenz as owner an opportunity to defend the vessel, as the Court has evidence of his ownership because of statements given by Melissa Keyes in the Trial Transcript that all rights to the vessel were granted to Bernard Dolenz; Dolenz had his statement of claim before the Court

April 6, 1987; and the assignment from Melissa Keyes to Bernard Dolenz delivered on or about March 26, in Dallas, Texas to Bernard Dolenz. What further proof or notice could the Plaintiff or the Court require?

Accordingly, Bernard Dolenz requests that the judgment be vacated and that he be allowed to defend the vessel in the interest of justice.